Journal of Law and Health

Volume 5 | Issue 2 Article 5

1991

I Shot the Sheriff, but Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege

Brian Domb

I SHOT THE SHERIFF, BUT ONLY MY ANALYST KNOWS: SHRINKING THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

I. INTRODUCTION 209
II. WHAT BROUGHT YOU HERE TODAY?: PRIVILEGE LAW IN GENERAL 211
III. THE FEDERAL RULES OF EVIDENCE 216
IV. TELL ME MORE ABOUT YOUR CHILDHOOD: THE PSYCHOTHERAPIST-PATIENT PRIVILEGE 220
V. DO YOU HAVE ANY OTHER PROBLEMS?: OTHER DIFFICULTIES WITH THE PSYCHOTHERAPIST-PATIENT PRIVILEGE 228
VI. IS THERE ANYTHING ELSE YOU WOULD LIKE TO DISCUSS?: EXCEPTIONS TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE 229
VII. I SEE OUR SESSION IS ALMOST OVER: SOME CONCLUDING REMARKS 236

I. INTRODUCTION

When Jose Menendez, a wealthy entertainment industry executive, and his wife, Kitty, were found shotgunned to death in their North Elm Drive mansion on the night of August 20, 1989, foul play by organized crime was suspected at first. But last March, this wealthy enclave was shocked when the police arrested the couple's two children, Erik Menendez, 19 years old, and Joseph Lyle Menendez, 22, and charged that they committed the crime to collect their $14 million inheritance faster. . . . The arrests came a few days after the police, armed with a search warrant, raided the Beverly Hills offices of the psychologist, Dr. L. Jerome Oziel. . . . The chief evidence appears to be audio conversations between the two suspects and their psychologist after the killing.[1]

The above excerpt, tragically all too real, from the Menendez case in

---

[1] Reinhold, *Case of Two Brothers Accused of Killing Parents May Test Secrecy Limit in Patient-Therapist Tie*, N.Y. Times, Sept. 7, 1990, at B9, col. 3 (nat'l ed.). This case is currently making its way through the California courts. Although a trial judge has ruled that the tapes can be used as evidence by the prosecution, the California Supreme Court delayed the release of the tapes so that it could decide whether to hear an appeal by lawyers for the defendants, who contend that the psychotherapist-patient privilege cannot be broken. *Id.* The only reported opinion to result so far from this tragic set of circumstances is Oziel v. Superior Court (CBS Inc.), 233 Cal. App. 3d 1284, 273 Cal. Rptr. 196 (1990), which involved the successful petition for a writ of mandamus by the psychologist to the Menendez brothers. The writ sought to set aside an order of the Superior Court which had granted public disclosure of videotapes made by the police of their search of Dr. Oziel's home. *Id.*

California, starkly reveals the continuous and unresolved tension between seeking truth in court and protecting confidentiality outside of court. The prosecutors claim that the conversations between the brothers and Dr. Oziel contain the best, and perhaps only evidence, connecting them with their parents' murder.[2] Attorneys for the defendants have invoked the psychotherapist-patient privilege, a rule of evidence that may exclude relevant evidence in order to protect the integrity of the therapeutic relationship between therapist and patient.[3] It may shock or disturb some to realize that the defendant may prevail on the evidentiary issue which would likely result in an acquittal for the brothers even though the evidence, if used, would probably convict them.[4] As one commentator has described it, Freud would argue for the defendants that the evidence must not be admitted, for even a single concession to secrecy would undermine the whole purpose of therapy which is to build a trusting relationship.[5] Brandeis, on the other hand, would argue for the prosecution that "sunlight is the best of disinfectants."[6]

This Note will discuss the psychotherapist-patient privilege as it relates to past crimes and will use the Menendez facts to analyze different problems associated with the privilege.[7] First, privileges law in general will

---

[2] *See* Reinhold, *supra* note 1. What is especially significant about the case is that it raises the issue of whether the exceptions to the psychotherapist-patient privilege should include a new category for information relating to past crimes.

[3] *See infra* notes 62-102 and accompanying text.

[4] The evidence would at least speak to the issue of the brothers' state of mind; that is, that they thought about and considered murdering their parents and at least *thought* that they had committed the murder.

[5] Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U.L. REV. 649 (1974).

[6] *Id. See* Note, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777 (1985). "On the one hand, the state has an interest in promoting the relationships that testimonial privileges protect, but on the other hand, the goal of criminal courts is to convict the guilty and acquit the innocent." *Id.* at 780. *See also* Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 598 (1980) which states that the dissonance between seeking truth in court and protecting confidentiality outside of court may eventually become too great for human beings to manage.

[7] It should be pointed out, however, that the argument for the privilege in the Menendez case may be greatly weakened because of the invasion of privacy that has already taken place due to the publicity surrounding the litigation. The privacy invasion coupled with the fact that the privilege would deprive a party of very important evidence, makes the case for rejecting the privilege quite strong. "When a medical problem becomes a legal issue, the need for evidence is great." Saltzburg, *supra* note 6, at 648. It is also possible that Dr. Oziel may have a duty to provide the information sought by the prosecutors. On the federal level at least, the law specifies an offense called "misprison of felony," which provides that a person is guilty of misprison when he has knowledge of the actual commission of a felony and conceals and does not, as soon as possible, make known the same to the authorities. Convictions under this law are rare because the courts have held that the Government must prove an "affirmative" act of concealment to make its case. *See generally* Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375 (1975). State laws often include misprison of felony within the psychotherapist-patient privilege so that on the state level this information is still privileged. *See, e.g.*, OHIO REV. CODE ANN. § 2921.11 (Pages 1990).

be described with an emphasis on the public policy rationales supporting the specific privileges; ample space will then be devoted exclusively to the psychotherapist-patient privilege, especially the unique problems associated with having any exceptions which allow testimony of psychotherapeutic communications. The Note will then discuss the recognized exceptions to the psychotherapist privilege to see if a case can be made for an exception relating to past crimes. Empirical studies have shown the futility in using the expectations of a reasonable patient about his or her confidences in determining the reasonableness of an exception to the privilege. Therefore, this Note argues for the adoption of a "not unreasonable" standard in analyzing the psychotherapist-patient privilege exceptions to conclude that courts should define (and legislatures should adopt) clearly worded psychotherapist-patient privilege rules with a homicide exception for past crimes. The current existence of the judicial discretion approach to privilege exception problems underscores the need for clearer and more uniform standards.[8]

II. WHAT BROUGHT YOU HERE TODAY?: PRIVILEGE LAW IN GENERAL

The word privilege comes from the Latin words *privata lex*, a prerogative given to a person or group of persons.[9] A privilege was originally a judicially recognized point of honor among lawyers in England.[10] Privileged communications are an exception to the general rule that all relevant facts may be inquired into by a court of law. It may come as no surprise to the reader of a legal journal that the only privilege allowed under early common law was between attorney and client. Because the client had a privilege not to be called by an opponent, it seemed unfair to allow an opponent to call the client's lawyer to testify against her.[11] Many modern commentators have described the evidentiary privileges as originating from competing professional jealousies, impeding the pursuit of truth and serving no important societal goal; privileges originate from the political influence of those who benefit from them.[12] One scholar has written that "the poor man's only privilege is perjury."[13] Another

---

[8] *See infra* notes 117-36 and accompanying text.

[9] Note, *The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics*, 58 WASH. L. REV. 565, 566 n.6 (1983).

[10] Allred v. State, 554 P.2d 411, 413 (Alaska 1976).

[11] *See* 8 J. WIGMORE, EVIDENCE 2290 (J. McNaughton rev. 1961) [hereinafter WIGMORE].

[12] C. MCCORMICK, EVIDENCE § 77, at 156-57, 159 (2d ed. 1972) [hereinafter MCCORMICK]; *see also* Note, *Developments in the Law - Privileged Communications*, HARV. L. REV. 1480, 1493 (1985). Ethical standards are frequently intended to protect the professions rather than to safeguard the rights of clients. *See* Smith, *Unfinished Business with Informed Consent Procedures*, AM. PSYCHOLOGIST, Jan. 1981, at 22, col. 1.

[13] C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE, § 5422 at 676 (1980).

author has wondered to what extent the psychotherapist-patient privilege may have been created by the fear that disclosures would threaten or expose the therapist's practices and secrets—not the patient's.[14]

Green and Nesson have classified privileges into two distinct types.[15] The first is based on the professional counseling relationship between the holder of the privilege and the counselor for the purpose of fostering the effectiveness of the professional services; this category would include the lawyer-client, physician-patient, and priest-penitent privileges.[16] The second category seeks to throw a veil of secrecy around certain areas of privacy in order to protect autonomy and dignity; the marital privilege and the privilege against self-incrimination fall into this latter group.[17] Green and Nesson emphasize the societal interests in the law of privileges rather than embracing the power theory, political explanation of other evidence scholars.

It should be pointed out that there is a legal difference between the concepts of privilege and confidentiality. *Privilege* is an exception to the general rule that the public has a right to every man's evidence; *confidentiality* is an *ethic* that protects a client from unauthorized disclosure of information. The presence of confidentiality alone is *not* enough to support a privilege.[18] Without a privilege statute, a professional may be charged with contempt of court if he chooses not to testify.[19] On the other hand, a breach of confidentiality may result in a tort action by the client/patient.[20] In other words, confidentiality is a professional duty to refrain from speaking about certain matters, while privilege is a relief from the duty to speak in court proceedings.[21] For instance, in *State v. Mark*,[22] a

---

[14] Medlin, *How Private is Privacy?*, PSYCHIATRY DIGEST, Feb. 1969, at 13. The psychotherapist-patient privilege actually belongs *only* to the patient. If the client waives the privilege, the therapist *must* testify since he does not hold the privilege independently of the client. *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

[15] E. GREEN & C. NESSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE (1983).

[16] *Id.* at 525-26.

[17] *Id. See also* Comment, *The Psychotherapist-Patient Privilege In Federal Courts*, 59 NOTRE DAME L. REV. 791 (1984).

[18] For example, professional accountants have a *duty* to maintain confidentiality: however, unless there is a statute granting a privilege, an accountant must testify in court about client confidences. On the other hand, the marital communications privilege may exist by statute although there is no *duty* of confidentiality in the marital relationship.

[19] *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (psychotherapist held in contempt of court for refusing to testify about a patient where the patient had waived the privilege).

[20] *See* Comment, *Psychotherapists' Liability for Extrajudicial Breaches of Confidentiality*, 18 ARIZ L. REV. 1061 (1976) (discussing causes of action against psychotherapists for breaches of confidentiality).

[21] Hayden, *Should There Be A Psychotherapist Privilege In Military Courts-Martial?*, 123 MIL. L. REV. 31, 33 (1989).

[22] 23 Wash. App. 392, 394-95, 597 P.2d 406, 407-08 (1979).

Washington court of appeals found that the confidentiality requirements of the Washington Board of Pharmacy did not create an evidentiary privilege.[23] Nonetheless, confidentiality and privilege continue to be used by some writers in an interchangeable, and therefore confusing, manner.[24]

No discussion of privileges would be complete without some discussion of Wigmore's four conditions that must be met before any privilege can be legally recognized. These almost universally accepted criteria are as follows:

(1) The communications must originate in a *confidence* that they will not be disclosed.
(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between parties.
(3) The *relation* must be one which, in the opinion of the community, ought to be sedulously fostered.
(4) The injury that would inure to the relation by disclosure must be *greater than the benefit* thereby gained for the correct disposal of litigation.[25]

Unfortunately, Professor Wigmore does not discuss how he developed these four postulates for determining the existence of a privilege.

A negative answer to any of the four criteria, in Wigmore's view, negated the justification for a privilege. Wigmore evaluated the husband-wife, attorney-client, and clergy-communicant relationships to determine whether each met the four criteria for a privilege.[26] Although the first statutory recognition of the physician-patient privilege dates back to 1828 in New York,[27] Wigmore contended that the physician-patient relation-

---

[23] In State v. Thompson, 54 Wash. 2d 100, 104, 338 P.2d 319, 322 (1959), the Washington Supreme Court stated: "It does not necessarily follow from the use of the word *confidential* that it was the legislative intention that this word have the same import as the word *privileged*."

[24] *See, e.g.*, Freudenheim, *Guarding Medical Confidentiality*, N.Y. Times, Jan. 1, 1991, at 24, col. 1 (nat'l ed.).

[25] WIGMORE, *supra* note 11, at 527 (emphasis in original). Justice Dimond, in a concurring opinion in Allred v. State, 554 P.2d 411, 428-29 (Alaska 1976), argued that the third criterion should not be used:

> The need for a privilege should not depend upon community approval of the relationship. Rather, it is . . . the legitimate value to the participants which should be weighed against the truth-finding function of the courts. Some persons feel that religion is of no value to society. If this belief became prevalent, then under the Wigmore canons, the priest-penitent privilege would disappear. . . .

Id. Those criteria have also been criticized for allowing too many privileges! *See* Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1230 (1962).

[26] WIGMORE, *supra* note 11, at 642.

[27] It was presumed that people would be more willing to seek medical treatment if they were protected from disclosure of their condition. Since the time of its adoption, the physician-patient privilege has been subject to the criticism that it impedes a court's ability to determine the facts. *See* Guernsey, *The Psychotherapist-Patient Privilege In Child Placement: A Relevancy Analysis*, 26 VILL. L. REV. 955, 959 (1981).

ship succeeded only on the third test, and therefore, ought not to be privileged.[28] Professor McCormick has concurred with Wigmore's conclusions concerning the physician-patient privilege: "More than a century of experience with the statutes has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud. Consequently, the abandonment of the privilege seems the best solution."[29] It is reasonable to assume that Wigmore did not evaluate the psychotherapist-patient relationship because psychotherapy was in its infancy at the time the privilege criteria were established.[30] Several writers have noted, however, that Wigmore's four tests are satisfied in the context of psychotherapist-patient relations even if there is no physician-patient privilege according to the same criteria.[31] The psychotherapeutic relationship is by its nature more intimate and personal than the physician-patient relationship; patients will seek medical treatment even if there is a risk of disclosure since there is little chance of stigmatization in being treated by a general practitioner.[32] The same cannot be said for treatment by a psychotherapist.[33]

Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence."[34] As such, they are to be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[35] The most widely accepted privileges, and perhaps the least controversial, are those which protect communications between attorney and client,

---

[28] Many legal scholars agree. *See, e.g.*, Curd, *Privileged Communications Between the Doctor and his Patient - An Anomaly of the Law*, 44 W. VA. L.Q. 165 (1958); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943).

[29] MCCORMICK, *supra* note 12, § 105 at 228.

[30] Knapp, VandeCreek & Zirkel, *Privileged Communications For Psychotherapists In Pennsylvania: A Time For Statutory Reform*, 60 TEMP. L.Q. 267, 270 (1987).

[31] *See, e.g.*, Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960), *cited in* FED. R. EVID. 504 advisory committee notes. *See also* 4 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORTS AND SYMPOSIUMS, REPORT NO. 45, 95 (1960); Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U.L. REV. 384, 386-87 (1952).

[32] Hayden, *supra* note 21, at 39.

[33] Psychiatric communications deal with a patient's *behavioral* symptoms. Senator Eagleton, George McGovern's 1972 presidential running mate, was dropped from the ticket when it was disclosed that he had received psychiatric care in the past. A hospital record revealed hospital admissions where he received electroshock therapy for depression. No psychiatric history came to light; the very existence of a record consigned Eagleton to the history books. *See* Slovenko, *supra* note 5, at 652 n. 7.

[34] United States v. Bryan, 339 U.S. 323, 331 (1950).

[35] Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

husband and wife, and priest-penitent. The purpose of the attorney-client privilege is to encourage the client to make complete disclosure to his attorney without fear that others may be informed.[36] Complete disclosure is necessary because attorneys are best able to handle matters in which they are fully informed; a client will voluntarily disclose more information if assured of confidentiality through the privilege.[37] The Supreme Court has acknowledged that the attorney-client privilege is the only testimonial privilege recognized at common law.[38]

The privilege against adverse spousal testimony allows one spouse to prevent the other from adversely testifying against him. Justification for this privilege has been found in its perceived role in fostering the harmony and sanctity of the marriage relationship.[39] The privilege against adverse spousal testimony is quite broad in that it applies to any adverse testimony, not only confidential communications.[40] This broadness can result in egregious abuse. For example, in *State v. Jacques*,[41] the defendant married the prosecution's star witness between his preliminary hearing and trial. His wife's testimony at the preliminary hearing was held to be inadmissible, and she was not required to testify due to the privilege against adverse spousal testimony.[42] Such abuse may have contributed in part to the recent contraction of the scope of this privilege.[43]

---

[36] Greyhound Corp. v. Super. Ct., 56 Cal. 2d 355, 396, 364 P.2d 266, 288, 15 Cal. Rptr. 90, ___ (1961).

[37] This essential trust in the attorney-client relationship has been cited as precedent for a psychotherapist-patient privilege in order to promote full disclosure and effective treatment. *See* Note, *The Case For A Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 DUKE L.J. 1217 (1985).

[38] Upjohn Co. v. United States, 449 U.S. 383, 389 (1980). The *Upjohn* Court held that the "purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id.* The Upjohn case involved an internal investigation by a manufacturer's general counsel that included sending questionnaires to the manufacturer's managers. *Id.* The Court held that the responses to these questionnaires were within the attorney-client privilege and that the work-product privilege protected the general counsel's notes and memoranda based on oral statements. *Id. But see Defense Lawyer Is Jailed Over Client Confidentiality*, N.Y. Times, Feb. 15, 1991 at A12, col. 3 (nat'l ed.) about a Pennsylvania lawyer who went to jail rather than answer a subpoena requiring her to violate the lawyer-client privilege. The attorney, Linda Backiel, is quoted from her cell stating, "I really think everyone who goes to law school should spend a week in jail. I think they'd get a sense of the arbitrariness and power of the law. I think they'd understand the importance of having an advocate." *Id.*

[39] Trammel v. United States, 445 U.S. 40, 44 (1980). A husband could prevent his wife from testifying about criminal acts of the husband. *Id.* at 51.

[40] Comment, *The Marital Testimony and Communications Privileges: Improvements and Uncertainties in California and Federal Courts*, 9 U.C.D.L. REV. 569, 595 (1976).

[41] 256 N.W.2d 559 (S.D. 1977).

[42] *Id.* at 564.

[43] *See e.g.*, United States v. Mendoza, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978) (holding that conversations between husband and wife about crimes in which they have participated do not fall within the scope of privileged marital communications).

The priest-penitent privilege derives from society's desire to protect a relationship of trust and confidence, as well as from a realization that requiring clergy to testify will not necessarily produce testimony. The concept of jailing a clergyman for adhering to the absolute duty imposed upon him by deep religious beliefs is offensive.[44] In some jurisdictions, a clergyman holds the privilege independently of the penitent, if revealing the penitent's confidence would violate the tenets of the clergyman's faith.[45]

It is worth mentioning that in recent years, courts have tended to take seriously the Supreme Court's belief that, in general, the public has a right to every man's evidence.[46] It should therefore not be surprising that in the past few years several proposed new privileges have been rejected. The rejections have included an employer-stenographer privilege,[47] a required reports privilege,[48] an accountant-client privilege[49] and a welfare records privilege.[50] In fact, the psychotherapist-patient privilege may have just been approved under the wire.[51]

III. THE FEDERAL RULES OF EVIDENCE

By order of the Supreme Court, on November 20, 1972, a proposed set of evidence rules was transmitted to Congress. They were the result of seven years of labor by the Advisory Committee on Rules of Evidence, appointed by Chief Justice Earl Warren.[52] The Supreme Court's proposal

---

[44] Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV., 95, 113 (1983).

[45] *Id.* at 137-38. This distinguishes the priest-penitent privilege from that of the psychotherapist-patient privilege which is *only* held by the patient. However, *see* Hayden, *supra* note 21, at 39 n. 59.

[46] United States v. Bryan, 339 U.S. 323, 331 (1950).

[47] United States v. Schoenheinz, 548 F.2d 1389 (9th Cir. 1977).

[48] *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373 (3rd Cir. 1976).

[49] Lewis v. Capital Mortgage Inv., 78 F.R.D. 295 (D. Md. 1978).

[50] State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169-70, 169 P.2d 706, 711 (1946).

[51] Although no general physician-patient privilege was recognized at common law, the states began to adopt limited statutory privileges for the psychotherapist-patient relationship in the early 1950's. *See* Rule 504 Advisory Committee Note, Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 242 (1973). Some commentators have argued that a psychotherapist-patient privilege will save a psychotherapist from being faced with a "cruel trilemma." (The term was coined by Professor Robert Aronson, Professor of Evidence at the University of Washington). Under the "cruel trilemma," psychotherapists are obligated to choose among one of three undesirable results: 1) to violate the extraordinary trust placed on them by their clients and the profession; 2) to lie, and thereby commit perjury; or 3) to refuse to testify and thereby be held in contempt of court. This dilemma has led to "memory lapses" on the witness stand, fabrications, curtailment of therapy, and even the maintaining of two sets of records (or very sparse record-keeping). *See* Note, *The Psychotherapist-Patient Privilege In Washington: Extending The Privilege To Community Mental Health Clinics*, 58 WASH. L. REV. 565, 572 (1983).

[52] Note, *Psychotherapist-Patient Privilege Under Federal Rules Of Evidence 501*, 75 J. CRIM. L. & CRIMINOLOGY 37 (1984).

consisted of thirteen rules including the following nine privileges: required reports,[53] attorney-client communications,[54] psychotherapist-patient communications,[55] husband-wife communications,[56] clergy-worshipper communications,[57] political votes,[58] trade secrets,[59] secrets of state and other official information,[60] and identities of informers.[61] The Psychotherapist-Patient Privilege, as defined in Proposed Rule 504, provided in pertinent part:

> (b) General rule of privilege.
> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.
> (c) Who may claim the privilege.
> The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of the deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.
> (d) Exceptions.
> (1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.
> (2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.
> (3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of

---

[53] PROPOSED FED. R. EVID. 502, 56 F.R.D. 183, 234-35 (1972).
[54] PROPOSED FED. R. EVID. 503, 56 F.R.D. at 235-37.
[55] PROPOSED FED. R. EVID. 504, 56 F.R.D. at 240-41.
[56] PROPOSED FED. R. EVID. 505, 56 F.R.D. at 244-45.
[57] PROPOSED FED. R. EVID. 506, 56 F.R.D. at 247.
[58] PROPOSED FED. R. EVID. 507, 56 F.R.D. at 249.
[59] PROPOSED FED. R. EVID. 508, 56 F.R.D. at 249-50.
[60] PROPOSED FED. R. EVID. 509, 56 F.R.D. at 251-52.
[61] PROPOSED FED. R. EVID. 510, 56 F.R.D. at 255-58.

> his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or his defense.[62]

The proposed rules turned out to be quite controversial, prompting Congress to intervene for the first time in the rule-making process.[63] Under the Rules Enabling Act, the proposed rules would have taken effect automatically had Congress not acted within ninety days.[64] Congress took the somewhat unusual step of amending the Rules Enabling Act so as to require Congressional approval for any amendment of the rules *on privilege only*.[65] Because the controversy over the privilege section threatened to jeopardize passage of the entire package of evidence rules, the House Judiciary Subcommittee unanimously agreed that the specific privilege rules proposed by the Court should be eliminated[66] and proposed in its substitution the present Rule 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or polit-

---

[62] 56 F.R.D. at 240-41. The privilege, as originally written, left out exceptions that would later be formulated by the courts such as the exception for reporting child abusers and the duty to warn potential victims about the dangerousness of a patient. *See, e.g.*, Note, *Confidentiality, An Absolute Obligation?*, 52 MOD. L. REV. 715 (1989); Note, *Duties In Conflict: Must Psychotherapists Report Child Abuse Inflicted By Clients And Confided In Therapy?*, 22 SAN DIEGO L. REV. 645 (1985).

Another real difficulty with the proposed privilege is that, as written, it only applies to psychiatrists and psychologists; left out are other providers of psychotherapy such as psychiatric social workers. *See* Slovenko, *supra* note 5, at 663-64 n. 28.

[63] For one thing, they raised the issue of federalism. Proposed Rule 501 would have required that in the federal courts rules of privilege would only be governed by the Constitution, Acts of Congress and the Federal Rules as adopted by the Supreme Court; privileges created by state law would have been ignored. Congress resolved this issue by adopting the present Rule 501 which provides that state privilege law controls in diversity cases but privilege issues in other cases will be governed by federal or state law depending on the particular element of the claim or defense and whether state law supplies the rule.

The proposed rules also created controversy about the allocation of power in society; the proposed rules gave the impression that the rights of government and corporations took a higher place than individual rights. This is why the proposed rules included privileges for trade secrets, secrets of state and other official information. *See* C. WRIGHT & K. GRAHAM, *supra* note 12, at 687.

[64] 28 U.S.C. § 2071 (1976). This rule gives the Court the power to prescribe rules of civil procedure. The evidence rules were proposed under § 2072 which governs rules of civil procedure.

[65] 28 U.S.C. § 2076 (1976). Approval was not required for the amendment of any other rules.

[66] *Rules of Evidence: Hearings on H. R. 5463 Before the Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) (Senate Judiciary Committee Staff Memorandum), *reprinted in* 4 J. BAILEY & O. TRELLES, THE FEDERAL RULES OF EVIDENCE LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 355, 356 (1980).

> ical subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.[67]

This rule was the only one on which all parties could agree since it, in effect, would leave the federal law of privilege as it had already been—an area that federal courts were to continue to develop on a case-by-case basis.[68]

In civil actions that involve "an element of a claim or defense as to which state law supplies the rule of decision,"[69] state privilege law applies because no overriding federal interest exists to outweigh enforcement of state policy. Rule 501 mandates application of federal, rather than state privilege law in criminal and non-diversity civil cases brought in federal court because federal law is enforced in those cases.[70] The result of the Rule 501 compromise was to leave the recognition of a psychotherapist-patient privilege in a state of chaos; some federal courts have rejected the privilege,[71] while others have embraced it.[72] After the adoption of Rule 501, the National Commission of Uniform Laws included a slightly modified version of Rule 504 in the Uniform Rules of Evidence. This rule has been adopted verbatim or almost verbatim in thirteen states: Cali-

---

[67] FED. R. EVID. 501.

[68] 120 CONG. REC. 40, 891 (1974).

[69] FED. R. EVID. 501.

[70] Thus, the Menendez case may have been brought in state, rather than federal, court since the psychotherapist-patient privilege exists on the state level in California. Had the case been brought in federal court, as a criminal case it would have called for federal privilege law. The federal circuits are split in recognizing the psychotherapist-patient privilege; even some that recognize it will not do so in a criminal case. *See infra* notes 71-72, 133-36 and accompanying text. Congress based Rule 501 on the rationale that federal law should not supercede state law, in a substantive area such as privileges, without a compelling reason. United States v. Gillock, 445 U.S. 360, 369 (1980).

[71] *See, e.g.*, United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983) (psychotherapist-patient privilege does not exist); United States v. Witt, 542 F. Supp. 696 (S.D.N.Y.), *aff'd* 697 F.2d 301 (2d Cir. 1982) (refusing to recognize the privilege); United States v. Meagher, 531 F.2d 752 (5th Cir. 1976) (rejecting the privilege); United States v. Layton, 519 F. Supp. 946, 959 (N.D. Cal. 1981) (privilege did not exist at common law and therefore not at federal law); United States v. Brown, 479 F. Supp. 1247 (D. Md. 1979) (no privilege exists). These courts do not distinguish the psychotherapist-patient privilege from the physician-patient privilege.

[72] *See. e.g., In re* Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (court used Proposed Rule 504 to recognize psychotherapist-patient privilege); Flora v. Hamilton, 81 F.R.D. 576, 579 (M.D.N.C. 1978) (using Proposed Rule 504 to recognize a psychotherapist-patient privilege).

fornia,[73] Delaware,[74] Florida,[75] Hawaii,[76] Illinois,[77] Maine,[78] Nebraska,[79] Nevada,[80] New Mexico,[81] North Dakota,[82] Oklahoma,[83] Oregon,[84] and Wisconsin.[85]

What is it about the psychotherapist-patient privilege that has resulted in its uncertain adoption and application within the legal system?

IV. TELL ME MORE ABOUT YOUR CHILDHOOD: THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Psychotherapy is the treatment of mental or emotional disorders by verbal or other symbolic communication between patient and therapist.[86] The therapy is often augmented by drugs but is frequently used as the sole method of treatment for interpersonal problems or for dealing with thoughts, feelings, or actions that people find disagreeable to themselves or others.[87] Treatment is largely in the hands of the traditional mental health professions of psychiatry, psychology, and social work; however, therapy is increasingly performed by mental health counselors, pastoral counselors and other professionals.[88] Although there are many types of psychotherapy, the model upon which privilege arguments are usually based is psychoanalysis as originated by Sigmund Freud. Psychoanalysis is used as a springboard to support the psychotherapist-patient privilege because it is based on the theory that a patient's problems result from conflicts repressed in the unconscious which must be probed in order to treat the patient.[89]

---

[73] CAL. EVID. CODE § 1014 (West Supp. 1990).
[74] DEL R. EVID. 503 (1990).
[75] FLA. STAT. § 90.503 (1985).
[76] HAW. REV. STAT. § 626-504.1 (Spec. Pamphlet 1980).
[77] ILL. REV. STAT. ch. 111, para. 5306 (1985).
[78] ME. R. EVID. 503(b) (1986).
[79] NEB. REV. STAT. § 27-504 (1985).
[80] NEV. REV. STAT. § 49.215 (Supp. 1981).
[81] N.M. R. EVID. 504 (1983).
[82] N.D. R. EVID. 503 (Supp. 1985).
[83] OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1989).
[84] OR. REV. STAT. § 40.230 (Supp. 1983).
[85] WIS. STAT. ANN. § 905.04 (West Supp. 1986).
[86] J. KOVAL, A COMPLETE GUIDE TO THERAPY 264 (1976).
[87] *See* Knapp, VandeCreek & Zirkel, *supra* note 30, at 268.
[88] *Id.* Indeed one of the great difficulties with the privilege is defining the professional to whom it should apply.
[89] The basic argument is that unless the patient is assured that the therapist has no authority over him - e.g., through disclosure in a courtroom - the built-in resistance to full disclosure won't be overcome.

> We pledge him to obey the *fundamental rule* of analysis, which is hence forward to govern his behavior toward us. He is to tell us not only what he can say authentically and willingly, what will give him relief like a confession, but everything else as well that his self-observation yields him, everything that comes into his head, even if it is *disagreeable* for him to say it, even if it seems *unimportant* or actually *nonsensical.*

The protection of a relationship of trust and confidence between patient and therapist and the encouragement of free disclosure are the underlying policies of the psychotherapist-patient privilege.[90] Congress was aware of this special need for confidentiality even though it rejected Rule 504:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.[91]

By refusing to adopt Rule 504 as proposed by the Supreme Court, Congress did not intend to repudiate the psychotherapist-patient privilege but to merely consign its application to a case-by-case basis.[92]

---

23 S. FREUD, AN OUTLINE OF PSYCHOANALYSIS, in STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 141 (1964) (emphasis in original). Psychotherapy has also been defined as:

> A method or system of alleviating or curing certain forms of disease, particularly diseases of the nervous system or such as are traceable to nervous disorders by suggestion, persuasion, encouragement, the inspiration of hope or confidence, the discouragement of morbid memories, associations, or beliefs, and other similar means addressed to the mental state of the patient without (or sometimes in conjunction with) the administration of drugs or other physical remedies.

BLACK'S LAW DICTIONARY 1104 (5th ed. 1979).

[90] *See* Note, *The Psychotherapist-Client Testimonial Privilege: Defining The Professional Involved*, 34 EMORY L.J. 777, 797-800 (1985).

[91] Proposed Fed. R. Evid. 504, 56 F.R.D. at 242 (1972) (Advis. Comm. Note) (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY REPORT NO. 45, 92 (1960)). An often quoted statement on this subject was made by Judge Luther Alverson in an address before the Connecticut Mental Health Association:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do if they knew that all they say - and all that the psychiatrist learns from what they say - may be revealed to the whole world from a witness stand.

M. GUTTMACHER & H. WEINOFEN, PSYCHIATRY AND THE LAW 272 (1952).

[92] The Senate Report to the new rules stated:

> The Committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rules submitted by the Supreme Court. It should be clearly

One commentator, advocating that a psychotherapist-patient privilege may be included within the constitutional right to privacy,[93] argued that the state's interest in having evidence for trial might not be helped in the long run by requiring that the confidences of therapy be revealed in court.[94] The promotion of evidence for trial may be more apparent than real; as patients recognize that their confidences may be revealed, they might be expected to minimize the confidential information revealed in therapy.[95] In the final analysis, this would actually limit rather than increase the amount of evidence in court that would derive from psychotherapy.[96] Dean Smith and other advocates of the constitutional right to privacy as the basis for the psychotherapist-patient privilege argue that theirs is a more secure foundation than reading the privilege into Rule 501-neither legislatures nor the courts can remove a constitutionally protected right.[97]

There is evidence that some people choose to pay for psychotherapy out of their own pockets rather than risk disclosure of treatment by filing insurance claims - a clear example that patients do in fact think about and react to the possibilities of disclosure.[98] Dr. Steven Sharfstein estimated that, in 1981, about fifteen percent of all adults who had employer-provided mental health insurance waived reimbursement in order to con-

---

understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. REP. NO. 93-1277, 93d Cong., 2d Sess. (1974) *reprinted in* U.S. CODE CONG. & AD NEWS 7051, 7059 (1974).

[93] Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1 (1980).

[94] *Id.* at 38.

[95] *Id.*

[96] *Id.* The author also applies this logic to the duty to warn potential victims of a psychiatrically ill patient, namely that such warnings will increase, not decrease, injuries and deaths by discouraging dangerous people from obtaining psychotherapy. *Id.* at 56 n. 290. On the issue of psychiatrists reporting patients who reveal that they have been abusing children, Dean Smith has written, "By requiring therapists to breach the confidence of patients, the state would be discouraging child abusers from seeking effective psychotherapy to deal with the problems that cause them to abuse their children." *Id.* at 59.

[97] *See* Note, *supra* note 52, at 399. A constitutional basis might also be of greater help to the poor, most of whom receive psychiatric care from social workers who are usually not included within the statutory versions of the psychotherapist-patient privilege. *See, e.g., Psychiatrist/Patient Privilege Doesn't Apply to Supervised Counselor, Court Rules*, The Psychiatric Times, Feb. 1991, at 61, col. 1 (Indiana Supreme Court upheld a lower court's decision that a social worker, supervised by a psychiatrist, is not covered by physician/patient privilege. It is unclear why the psychotherapist-patient privilege was not discussed.).

[98] Note, *supra* note 37, at 1228.

ceal that they received treatment.[99] One person even quit his job because he had to hand his medical bills to the personnel manager of his company.[100] Public reaction to the fact that Senator Thomas F. Eagleton had been treated for depression led to George McGovern choosing another vice presidential candidate.[101] "Evidence is plentiful that a former mental patient will encounter serious obstacles in attempting to find a job. . . . In the job market, it is better to be an ex-felon than an ex-patient."[102] It seems reasonable to conclude that at least *some* people care about privacy in psychotherapy enough to warrant the judicial system being circumspect in its admission of evidence that would abridge the privilege.

In spite of all the talk about confidential information never being released (except in cases of imminent danger), such information is regularly disclosed. Although not in a judicial setting, the "privilege" of confidentiality is discarded routinely in reports, in insurance claims, to other professionals, in educational settings, and in research presentations.[103] There is reason to believe that many therapists accept a concept of privacy and confidentiality that is very paternalistic, allowing the therapist to be the judge of when the patient's expectation of confidentiality is justified and when it can be ignored.[104] Even Freud published case histories.[105]

Confidentiality is necessarily violated in forms of psychotherapy that require the inclusion of others as part of the treatment, such as family therapy, couples therapy, and group therapy. Family therapists have found that opening up certain family secrets for discussion contributes

---

[99] *Id.* at n. 55. *See also Defensiveness May Function to Prevent Psychopathology*, The Psychiatric Times, Feb. 1991, at 14, col. 1; *Patient-Therapist Relationship Contributes to Therapeutic Outcome*, The Psychiatric Times, Feb. 1991, at 25, col. 1.

[100] He took a different job without this requirement! Note, *supra* note 37, at 1228 n. 55.

[101] *Id.* at n. 56. Politicians fear admitting that they have received psychotherapy because of the effect it might have on voter confidence.

[102] Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E. D. Wis. 1972) *quoting* Bruce J. Ennis, ACLU, New York City, 1970 Hearings, at 284, *vacated*, 414 U.S. 473 (1974). It is not clear how much, if at all, this situation has changed. However, even those in psychiatry recognize that secrecy has its limits in terms of practicality. For instance, if a patient tells a doctor in confidence that he has brought a time bomb into the hospital and hidden it under the bed of one of his patients, "it would be a strange doctor indeed who would feel that this professional confidence should not be violated." K. MENNINGER, A MANUAL FOR PSYCHIATRIC CASE STUDY 36 (1960).

[103] Winslade & Ross, *Privacy, Confidentiality, and Autonomy in Psychotherapy*, 64 NEB. L. REV. 578, 615 (1985). The educational settings include verbal or written presentation of case histories, trainee observations of therapy sessions, and supervisor observation of trainee work.

[104] In practice, the avowal of limited disclosure to other professionals is widely abused, with violations ranging from cocktail party anecdotes (neither consented to nor adequately disguised), to case conferences in which no attempt is made to alter any details of the patient/client's life, and even the name is often revealed. *Id.* at 616.

[105] Some read like detective thrillers and carry sensational nicknames like, "The Rat Man" or "The Wolf Man." Slovenko, *Psychotherapy And Confidentiality*, 24 CLEV. ST. L. REV. 375, 383 n. 24 (1975).

to the well-being of the entire family.[106] Not all people in psychotherapy seek to avoid public disclosure - some disclose information as a "cry for help" and hope that others will intercede.[107] Some in analysis see their treatment as a status symbol rather than something to hide.[108]

The issue of whether there is a constitutional right to privacy as a basis for the psychotherapist-patient privilege remains largely unresolved.[109] The Report of the Senate Committee on the Judiciary on Rule 501 stated that the psychotherapist-patient privilege was one of nine rules defining "specific *nonconstitutional* privileges which the federal courts must recognize. . . ."[110] The arguments for and against the psychotherapist-patient privilege may not be the sort which justify unyielding constitutional rulings. Indeed, as the court in *In re Lifschutz*[111] discussed, therapists have never been able to practice with a guarantee of total confidentiality; it is therefore not entirely clear why they think that it is impossible to proceed with anything less than such a guarantee.[112]

The state's interest in overriding the privilege is to obtain important evidence. The psychotherapist-patient privilege presents a greater potential loss of information than, for example, the attorney-client privilege where a party may still obtain the privileged information via discovery.[113]

---

[106] I. CLICK & D. KESSLER, MARITAL AND FAMILY THERAPY 308 (2d ed. 1980).

[107] Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1039-40 (1974).

[108] M. GROSS, THE PSYCHOLOGICAL SOCIETY 147 (1978).

[109] Whalen v. Roe, 429 U.S. 589, 598 n. 24 (1977). There is also authority to the effect that the Court's decisions on the right to privacy refer only to family relations. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). In *Whalen*, the Court stopped short of recognizing a constitutional right in informational privacy, especially if the state takes appropriate steps to protect the information. Although the Court in the last twenty-five years has time and again invoked the constitutional right of privacy, none of the decisions have established this right with respect to a psychotherapist's disclosure of information gained from the therapeutic relationship. *See also* J. P. v. DeSanti, 653 F.2d 1080, 1087-90 (6th Cir. 1981) ("The Constitution does not explicitly mention a right of privacy. Nor has the Supreme Court recognized the existence of a general right to privacy. . . .[W]e conclude that the Constitution does not encompass a general right to nondisclosure of private information.").

[110] S. REP. NO. 1277, 93d Cong., 2d Sess. 11 (1974) (emphasis added).

[111] 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

[112] *Id.* at 438, 467 P.2d at 573, 85 Cal. Rptr. at ___. "The practice of psychotherapy has grown, indeed flourished, in an environment of non-absolute privilege." *Lifschutz* rejected the contention that the *therapist* has a privacy interest in the therapy conducted; only the *patient* has the right to prohibit or authorize disclosure of confidences revealed during psychotherapy. *See* Guernsey, *supra* note 27, at 982 n. 152 for a list of cases which have rejected a constitutional basis for the psychotherapist-patient privilege. It should be pointed out that where a psychiatrist is subpoenaed, the attorney does not necessarily await the testimony with bated breath. "The records, if any, are illegible or cryptic; and many psychiatrists say that since records are rarely kept, they could destroy theirs without arousing suspicion. In lieu of records, if called as a witness, the psychiatrist is not apt to be friendly." Slovenko, *supra* note 5, at 653.

[113] Assuming that there are no ancillary issues, such as Fifth Amendment issues.

Information that a therapist obtained in a psychiatric session can probably not be replicated; the prosecution's right to conduct its own psychiatric examination may not be an adequate substitute for the earlier, non-custodial (non-pressured) exam. Loss of information that is essential and relevant[114] may be too high a price to pay to avoid an invasion into the psychotherapist-patient relationship where it follows perhaps an equally great intrusion into a defendant's personal life - public accusation and a public trial.[115] The Supreme Court has described the importance of relevant evidence to our adversarial system in the following language:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The *very integrity of the judicial system* and *public confidence in the system* depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence either by the prosecution or by the defense.[116]

From the above discussion, it should be evident that the arguments for and against the psychotherapist-patient privilege are attractive. Will disclosure of patient confidences cause patients to discontinue therapy, not seek it or make it ineffective? In other words, will a weak privilege promote mental illness? On the other hand, are the confidential communications of psychotherapy truly important and necessary to an accurate resolution of a judicial proceeding? Would it not be wonderful if a scientific study could be done to attempt to answer these questions in order to guide the development of privilege law! No empirical research was cited by the supporters of proposed Rule 504.[117] In fact, no empirical study supporting or opposing a physician-patient or psychotherapist-patient privilege was cited by any of the drafters of state statutes in support of the privileges. However, there have been three studies reported in legal journals.

In 1962, the Yale Law Journal published a student comment entitled, *Functional Overlap Between the Lawyer and Other Professionals.*[118] Sev-

---

[114] For example, admitting to murdering one's parents to speed up one's inheritance is certainly essential and relevant in the murder trial following the crime.

[115] Saltzburg, *Privileges And Professionals: Lawyers And Psychiatrists*, 66 VA. L. REV. 597, 624 (1980).

[116] United States v. Nixon, 418 U.S. 683, 709 (1974). *See also* State v. Gotfrey, 598 P.2d 1325 (Utah 1979), where the court complained that a psychologist privilege closes "another window to the light of the truth." *Id.* at 1327-28.

[117] The consequences of an erroneous choice may be substantial - the curtailment of effective therapy or inaccurate decisions in judicial proceedings concerning life, liberty or property.

[118] Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

enty-one percent of the lay people questioned reported that they thought they would be less open in therapy if they knew their psychotherapist was legally obligated to release information from the therapy.[119] However, since the questionnaire informed those polled of the possibility of judicial disclosure, it assumed away the major issue of whether therapy patients contemplate the issues of disclosure and privilege prior to laying bare their minds in therapy. If people don't know about it, how can the privilege provide an inducement to greater openness in therapy?[120]

In 1976, the Supreme Court of California decided *Tarasoff v. Regents of the University of California*,[121] the landmark case which held that therapists owe a duty to use reasonable care to protect persons threatened by their patients. As with the possible erosion of their evidentiary privilege, therapists predicted that a duty to warn per *Tarasoff* would result in the destruction of trust between therapist and patient, dooming effective therapy. The Stanford Law Review conducted a survey of California therapists to determine the effects of *Tarasoff*.[122] The study found that one-fourth of the responding therapists observed that their patients were reluctant to discuss violent tendencies when the patient learned that the therapist might, in some circumstances, breach confidentiality.[123] However, the *Tarasoff* decision, with its conditional abrogation of confidentiality, has not resulted in the destruction of effective therapeutic relationships as prophesied by its critics.[124]

Shuman and Weiner[125] conducted a study of the effects of a privilege statute passed in Texas in 1979. They found no increase in treatment due to the passing of the privilege;[126] ninety-six percent of patients relied more heavily on the therapist's ethics for confidentiality than on a privilege statute.[127] The study concluded that, for most people, the absence of a privilege would not delay or deter therapy because they were unaware of its existence. In fact, the most prominent cause for withholding information by patients was not the status of the privilege, but fear of the therapist's personal judgment.[128] A majority of the judges polled thought

---

[119] *Id.* at 1255.

[120] Nearly one third of the lawyers polled stated that the privilege excluded information unavailable from nonprivileged sources. *Id.* at 1261.

[121] 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[122] Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165 (1978).

[123] *Id.* at 177, 183.

[124] Note, *Imposing a Duty to Warn on Psychiatrists - A Judicial Threat to the Psychiatric Profession*, 48 U. COLO. L. REV. 283, 293-95 (1977). Opponents of the duty to warn concede that psychiatry has flourished in jurisdictions that do not recognize a psychiatrist's testimonial privilege but suggest that it would have flourished even more had some patients not been deterred. *Id.* at 295.

[125] Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilage*, 60 N.C.L. REV. 893 (1982).

[126] *Id.* at 919.

[127] *Id.* at 920.

[128] *Id.* Thus, the action of the legislature in passing the privilege had little or no effect on the success or failure of therapy. Responses from psychiatrists also indicated that the passage of a privilege statute in 1979 had little impact on their practice of psychiatry. *Id.* at 922.

that the confidential communications submitted as evidence before them from therapeutic sessions were important to those cases and necessary for an accurate resolution of contested issues.[129] The judges also thought that the desired information was not available from a nonconfidential source and that such admissions were not sought to harass or encourage settlement.[130] No positive evidence was found that any emotional damage is done to patients who are called to account for their behavior in a court of law.[131] Unfortunately, despite great hope and anticipated euphoria, the empirical studies have not been very helpful in resolving the debate surrounding the privilege issue. In fact, the results of the studies are either used or ignored by both sides of the issue.[132]

The confusion resulting from the different policy considerations on both sides of the psychotherapist-patient privilege issue has predictably resulted in legal chaos: several federal courts have established that Rule 501 includes a psychotherapist-patient privilege,[133] while others have rejected it, holding that the psychotherapist-patient relationship is indistinguishable from the physician-patient relationship.[134] At least one

---

[129] *Id.* at 923.

[130] *Id.* The study concluded that although withholding data from therapists is common, it has little relationship to fear of disclosure but rather to the judgment of the therapist. Seventy percent of this information had to do with sexual acts and thoughts, nine percent concerned thoughts of violence and an additional nine percent concerned financial issues. *Id.* at 926. But when the therapist threatens to disclose or actually does so, communication of violent urges drops and often premature termination results. *Id. See also* Wagner & Weinstein, *Therapeutic Alliance and Involuntary Commitment of a Minor*, 8 JEFFERSON J. PSYCHIATRY 3 (1990) (illustrating the negative effect on the therapeutic alliance when a minor is present during commitment hearings at which his psychiatrist testified).

[131] Shuman & Weiner, *supra* note 125, at 926.

[132] *See, e.g.*, Smith, *supra* note 93, at 27 n. 168.

[133] *See, e.g., In re* Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (privilege evaluated according to common law precedents in case holding two psychiatrists in civil contempt for failing to respond to a subpoena by a grand jury in connection with billing fraud; the court wanted the identities of certain patients, dates of treatment and length of treatment on each date. Although the *Zuniga* court recognized the existence of the privilege, it held that it did not apply to the mere disclosure of a patient's identity); *In re* Pebsworth, 705 F.2d 261 (7th Cir. 1983) (same basic facts as *Zuniga* but the court found that the patient had waived the privilege by filing insurance reimbursement claims). *See also* Hawaii Psychiatric Society v. Ariyoshi, 481 F. Supp. 1028 (D. Haw. 1979) where the court stated that there was "no history of judicial, legislative or public acceptance of government access to confidential communications between a psychiatrist and his patient. To the contrary, courts, legislatures and commentators have long agreed on the need to protect those communications from disclosure." *Id.* at 1048-49.

[134] *See, e.g.*, United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983) (holding that a lower court had committed reversible error by denying mail fraud defendant's access to psychiatric material concerning the government's witness because, at the common law, there was no physician-patient privilege. "There is no federal statute creating such a privilege. Therefore, testimony concerning the doctor-patient relationship is admissible in Federal Court." *Id.* at 1167 n. 9); United States v. Witt, 542 F. Supp. 696 (S.D.N.Y.), *aff'd*, 697 F.2d 301 (2d Cir. 1982) (refusing to recognize psychotherapist-patient privilege).

commentator has pointed out that the very real possibility that a patient's communications to his psychotherapist will be protected in state court suits but not in federal court suits raising federal questions is problematic as it may dilute the effectiveness of state privilege law.[135] Additionally, the absence of a clear federal rule on the psychotherapist-patient privilege may have contributed to the unsure manner in which state psychotherapist privilege statutes have been implemented.[136] If one thing is clear, it is that the status and applicability of this privilege is anything but clear.

V. DO YOU HAVE ANY OTHER PROBLEMS?: OTHER DIFFICULTIES WITH THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A continuing thorny issue in this area of privilege law is: which practitioners of therapy are covered by the privilege? Slovenko[137] wondered whether the privilege should extend to the hairdresser of a woman who may in effect provide the services of a therapist![138] There are great variations among the states as to which professionals are covered by the privilege: some consider communications to psychologists, psychiatrists, and social workers within the protection of the psychotherapist-patient privilege;[139] some states include psychologist and psychiatrists only in their definition of psychotherapists;[140] others have separate privilege statutes for physicians,[141] psychiatrists,[142] licensed psychologists,[143] and social workers.[144] Sometimes, the privilege applies only to psychiatrists and

---

[135] Smith, *supra* note 93, at 3 n. 11.

[136] *See, e.g.*, Myers v. State, 251 Ga. 883, 884-85, 310 S.E.2d 504, 506 (1984) (nurse allowed to testify concerning her patient's confession of murder - privilege did not apply because the nurse was employed by the hospital and not the doctor); People v. Doe, 103 Ill. App. 3d 208, 430 N.E.2d 696 (1982) (therapist's knowledge of identity of individual resembling suspected ax murderer was not privileged); State v. Martin, 274 N.W.2d 893, 895-96 (S.D. 1979) (defendant could not invoke privilege after he told social worker of murder). Thus, it appears that the Menendez brothers would be out of luck in one of these states.

[137] *See supra* note 5, at 665.

[138] *Id* at n. 29.

> When women go to a hairdresser, something happens to them. They feel safe, they relax. The hairdresser knows what their skin is like under the makeup; he knows their age; they don't have to keep up any kind of pretense. Women tell a hairdresser things they wouldn't dare confess to a priest, and they are open about matters they'd try to conceal from a doctor.

J. STEINBECK, TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA (1962).

[139] Knapp, VandeCreek & Zirkel, *supra* note 30, at 275 n. 37.

[140] *Id.*

[141] *Id.* at n. 38.

[142] *Id.* at 276 n. 39.

[143] *Id.* at n. 40. The functional distinction betwen psychiatrists and psychologists is becoming increasingly blurred. *See* Garb, *Can Psychologists Learn To Prescribe?*, Am. Med. News, Feb. 25, 1991, at 7, col. 1.

[144] Knapp, VandeCreek & Zirkel, *supra* note 30, at 275 n. 41. *See also Physician-Patient Privilege in Indiana Limited to M.D.'s, Those They Closely Supervise*, Psychiatric News, Feb. 1, 1991, at 4, col. 1.

psychologists in criminal cases; social workers, school psychologists, and family, marriage and child counselors have no privilege in criminal cases.[145] On the other hand, a different jurisdiction may only permit the psychologist-patient privilege in civil cases.[146]

One commentator has suggested that by limiting the privilege among those performing therapy to psychologists and/or psychiatrists, states have violated the Equal Protection Clause of the Fourteenth Amendment.[147] Indeed, the poor, who receive most of their psychotherapeutic services from social workers, have often not been protected by the testimonial psychotherapist-patient privilege.[148]

It is important to note that a court-ordered psychiatric examination of a defendant does not harm the purpose of the psychotherapist-patient privilege - it is solely diagnostic and should not deter the patient from receiving psychotherapy elsewhere. This examination is generally for a determination of mental state/competency-to-stand-trial issues. It is not permissible, because of the Fifth Amendment, to use the court-ordered psychiatric exam as a source of evidence which would be relevant on the issue of guilt. An admission to the crime during such an exam cannot be considered by the trier of fact in determining whether the defendant committed the acts constituting the crime charged - but the admission can be used insofar as it relates to the defendant's mental state.[149] Indeed, part of the attraction for the prosecution to obtain Dr. Oziel's testimony as to the confessions of the Menendez brothers stems in part from the fact that this evidence would be free of Fifth Amendment problems; Dr. Oziel was not an agent of the state when he obtained the confessions.[150]

VI. IS THERE ANYTHING ELSE YOU WOULD LIKE TO DISCUSS?: EXCEPTIONS TO THE PSYCHOTHERAPIST PRIVILEGE

Special exemptions and exceptions have been carved out of the psychotherapist-patient privilege for those areas where the need for the in-

---

[145] CAL. EVID. CODE § 1014 (West Supp. 1987). The Menendez brothers are fortunate that they confessed to a psychologist and not a social worker! *See supra* note 1.

[146] *See, e.g.*, VA. CODE ANN. §§ 8.01-399, 8.01-400.2 (1984).

[147] Comment, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 PAC. L.J. 801, 808-14 (1979).

[148] Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050 (1973).

[149] *See, e.g.*, Griffith & Griffith, *The Patient's Right To Protection Against Self-Incrimination During the Psychiatric Examination*, 13 U. TOL. L. REV. 269 (1982). *See also* Lee v. County Court of Erie County, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1969), *cert. denied*, 404 U.S. 823 (1971); State v. Evans, 104 Ariz. 434, 436, 454 P.2d 976, 978 (1969). However, some consider statements made to a psychiatrist "real evidence" comparable with handwriting or fingerprints, as opposed to testimonial evidence; if so, objection to their admissibility is lessened.

[150] *See supra* note 1.

formation or testimony has been found to outweigh the benefits of confidentiality. Probably the most well known state-demanded breach of patient confidentiality is the duty that a therapist must warn potential victims of the violence threatened by their patients.[151] Although it may seem ironic, the special relationship between a therapist and patient which on the one hand is cause for protection of confidence also creates the duty to warn.[152] In terms of tort law, the special relationship between psychotherapist and patient creates a duty, in terms of a legal obligation, joining a series of other duty-creating relationships, including hospital-patient, parent-babysitter, school-pupil, tavern owner-business invitee, jailer-prisoner, and host-guest.[153] The therapist's duty to warn has been expanded to include cases where the threatened damage is only to property,[154] unintentional torts, and foreseeable although unidentifiable victims.[155] It is not clear as yet in the Menendez facts whether Dr. Oziel had any foreknowledge of the brothers' threats to hurt their parents; that is, whether the psychologist violated his duty to warn.[156]

---

[151] Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[152] In absence of such a special relationship, there is no duty to be a Good Samaritan and save a potential victim. As hard as it is to accept, in secular law, the swimmer who sees another drowning before his eyes is not required to do anything about it and may watch the person drown. Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966). The law does not require anyone to bind up the wounds of a stranger bleeding to death (Riley v. Gulf, C. & S.F. Ry. Co., 160 S.W. 595 (Tex. Civ. App. 1913)), to prevent a neighbor's child from hammering a dangerous explosive (Sidwell v. McVay, 282 P.2d 756 (Okla. 1955)), or to prevent a train from blocking a fire engine on its way to a fire (Louisville & Nashville R. Co. v. Scruggs & Echols, 161 Ala. 97, 49 So. 399 (1909)).

[153] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 342 (4th ed. 1971).

[154] Peck v. Counseling Service of Addison County, Inc., 146 Vt. 61, 499 A.2d 422 (1985) (case dealt with threat by patient to burn his father's barn down - which he did). However, in California, which is credited with starting the duty to warn trend in *Tarasoff*, a psychotherapist is under no duty to disclose a confidential communication where the risk of harm is only property damage. *See* Note, *Extending A Psychotherapist's Duty To Warn Beyond Protecting Life: Who Should Lock The Barn Door?*, 11 VT. L. REV. 353, 359 (1986).

[155] Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983) (first case to hold a therapist liable for his patient's unintentional, drug-induced, tort). *See* Note, *Psychiatrists Are Subject To Tort Liability For Failing To Protect The Public From Their Patients' Unintentional Acts*, 63 WASH. U.L.Q. 315 (1985). However, California's Supreme Court restricted the *Tarasoff* holding to cases where there is a threat to an identifiable or identified victim in Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980). *See also*, Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980) where the court found a psychiatrist liable for failing to confine a patient where he could have reasonably foreseen the patient's endangering others *even though* there was no readily identifiable victim in advance.

[156] Third parties may have a cause of action against a therapist for failure to warn when they are identifiable potential victims of the therapist's patient, *even* when the patient made no specific threat against them. The therapist is bound by this duty because he holds himself out and is licensed as one who diagnoses psychological problems and emotional and mental disorders. However, in Bellah

As a practical matter, a psychotherapist would fulfill his duty to warn simply by giving a timely warning to the potential victim.[157] If, after receiving a warning, the potential victim calls the police or initiates a commitment proceeding, the psychotherapist may be required to corroborate the warning. If a reasonable person would not believe that the intended victim could protect himself adequately after a timely warning,[158] the psychotherapist should be required to initiate emergency detention or civil commitment proceedings (if he believed the patient met the jurisdiction's standard of dangerousness for commitment).[159]

---

v. Greenson, 73 Cal. App. 3d 911, 916, 141 Cal. Rptr. 92, 95 (1977), the warning required by *Tarasoff* was limited to potential danger directed at *others*, not self-directed; the therapist has no duty to warn anyone of his patient's suicidal tendencies. *See* Note, *The Scope of a Psychiatrist's Duty to Third Persons: The Protective Privilege Ends Where the Public Peril Begins*, 59 NOTRE DAME L. REV. 770 (1984). One state court held that a psychotherapist may be liable for breaching the confidentiality of his patient if he voluntarily provides information without first asserting a privilege and then awaiting a court order - except where there is an affirmative duty to warn. Cutter v. Brownbridge, 183 Cal. App. 3d 836, 228 Cal. Rptr. 545 (1986).

It is interesting to note that the psychiatric profession strongly objected to the creation of a duty to warn, using arguments similar to those used against exceptions to the evidentiary privilege, i.e., that it would deter people from seeking therapy. In addition, the American Psychiatric Association argued that psychiatrists cannot accurately predict dangerousness; courts have generally rejected this argument (although technically correct), finding that all that is really required of a psychotherapist with regard to the duty to warn is to exercise due care as defined by reference to the standards of the psychotherapeutic community; that is, what a competent therapist in similar circumstances would do. The A.P.A. once argued for a court rule of evidence barring psychiatric testimony on the issue of future criminal conduct. In Barefoot v. Estelle, 463 U.S. 880, 899 (1983), the Supreme Court explicitly rejected this proposal. *See* Peter and Sanchez, *supra* note 43, at 471. *See also* Comment, *Perreira v. State*, 103 HARV. L. REV. 1192 (1990) discussing case of Perreira v. State, 768 P.2d 1198 (Colo. 1989) where the Colorado Supreme Court held that a state psychiatrist was liable for any third party harm resulting from the negligent release of a violent, involuntarily committed patient; Freedman, *The Psychiatrist's Dilemma: Protect the Public or Safeguard Individual Liberty?*, 11 U. PUGET SOUND L. REV. 255 (1988); Note, *supra* note 156, at 770, for a discussion of the lawsuit, brought by White House Press Secretary James Brady and two other men injured in John Hinckley's assassination attempt on President Reagan, against Hinckley's psychiatrist for failing to warn law enforcement officials (and Hinckley's parents) of the patient's condition and potential for political assassination.

[157] In *Tarasoff*, the victim's life would have been spared had she not voluntarily associated with her killer.

[158] Such as by not associating with the patient, by locking doors, or by securing increased protection.

[159] *See* Note, *Professional Obligation and the Duty to Rescue: When Must a Psychiatrist Protect His Patient's Intended Victim?*, 91 YALE L.J. 1430, 1445 (1982). Although mental health professionals have both ethical and professional guidelines, none really address, surprisingly, *Tarasoff*-like situations. *See* AMERICAN PSYCHIATRIC ASSOCIATION, THE PRINCIPLES OF MEDICAL ETHICS (1981); AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS (1981); NATIONAL ASSOCIATION OF SOCIAL WORKERS, CODE OF ETHICS (1980); AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR PROVIDERS OF PSYCHOLOGICAL SERVICES (1977).

Another exception to the psychotherapist-patient privilege exists when the patient has raised his mental condition as an issue in the case.[160] The basic premise of this patient-litigant exception is that the patient has waived any privilege covering information relevant to his mental or emotional condition.[161] If a party places his physical or mental condition into issue, such as in a suit for personal injuries, he cannot then preclude an opposing party's inquiry into that condition by asserting a privilege. This exception has been applied as a justification for broad discovery of mental and physical examinations under Rule 35(a) of the Federal Rules of Civil Procedure:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to the produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.[162]

The waiver basis of the patient-litigant exception to the psychotherapist-patient privilege appears again in other instances where a patient has been found to waive the privilege. In *In re Zuniga*,[163] described as the most significant federal case on the psychotherapist-patient privilege,[164] two psychotherapists were held in civil contempt for failing to

---

[160] *See, e.g.*, Miller v. Colonial Refrigerated Transp., Inc., 81 F.R.D. 741 (M.D. Pa. 1979) (even assuming a constitutional basis for the psychotherapist-patient privilege, there is an exception when the patient raises her mental condition as an issue).

[161] *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). Psychotherapists oppose this exception as they see it interfering with effective therapy, although it may help the patient's legal posture that he appear as crazy as possible. A client who is eager to win a case may lose his incentive to improve his mental condition. "What may be in a person's best legal interests, i.e., maintenance of dramatic symptoms in order to present a sound case for disability or liability, may be directly contrary to his therapeutic interests, i.e., relinquishing of symptoms." Dubey, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093 (1974).

[162] FED. R. CIV. P. 35 (a). In other words, Dr. Oziel's testimony about the Menendez brothers would be available if their mental condition is raised by them as an issue in the case. It is important to note that normally, evidence given by a psychotherapist relating to a victim's allegations would be *hearsay*, but the evidence given relating to a defendant's *admissions* survive hearsay problems by fitting within the exception for admissions by a party to the action. CAL. EVID. CODE § 1220 (1984). *See* Note, *Vanishing Exception to the Psychotherapist-Patient Privilege: The Child Abuse Reporting Act*, 16 PAC. L. J. 335, 349 n. 148 (1984).

[163] 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

[164] Hayden, *supra* note 21, at 52.

respond to a subpoena *duces tecum* issued by two separate grand juries.[165] The records were sought in relation to investigations of alleged fraud in Blue Cross-Blue Shield billings. The Sixth Circuit upheld the contempt judgments because the provider had waived the psychotherapist-patient privilege by disclosure of similar information to insurance companies.[166]

Perhaps the most widely recognized exception to the psychotherapist-patient privilege is the duty of the psychotherapist to report the occurrence of child abuse revealed during therapy. All fifty states have child abuse reporting statutes to protect the child,[167] and many state evidence codes explicitly recognize such testimony to be an exception to the privilege.[168] Experts in the field of abuse believe that a single therapist cannot handle the complexities and multiple needs of an abusive family and that it is to the advantage of both the patient and therapist to seek the participation of protective agencies.[169] Indeed, many authorities believe that the criminal justice system plays an important and positive role in the treatment of sex offenders.[170] Arguably, a patient who is abusing children is currently a danger to others and so the duty to report is similar to the duty to warn discussed previously; the duty is to prevent a future crime, not punish a past one.

However, applying the dangerous patient duty to warn exception to child abuse may be complicated. What if the patient is in fact no longer dangerous? From the language of some child abuse reporting statutes, it appears that past abuse is included in the exception to the privilege.[171] The decision whether or not to investigate is left to child protective services, based on such factors as how long ago the abuse happened, the type

---

[165] *In re* Zuniga, 714 F.2d 632, 634 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

[166] *Id.* at 640. For a recent discussion of issues involved in the financial reimbursement of psychiatric care, see Zigun, *Technical Considerations Regarding Requests for Disability Documentation in the Context of Psychotherapy*, 21 PSYCHIATRIC ANNALS 112 (Feb. 1991).

[167] Note, *The Psychotherapist-Patient Privilege, The Child-Abuse Exception, And The Protection Of Privacy Through The Fifth Amendment*, 6 WHITTIER L. REV. 1033, 1039 (1984). The laws were passed in response to the public concern generated by a well publicized study which documented physical injuries to children and coined the term "battered child syndrome." Kempe, Silverman, Droegmueller & Silver, *The Battered Child Syndrome*, 181 J. A.M.A. 17 (1962).

[168] Note, *supra* note 167, at 1042 n. 67. Although most commentators agree that one would be hard pressed to find a state interest that is more compelling than the protection of the welfare of children, some still argue that a privilege exception would actually discourage child abusers from seeking psychotherapy to control their abuse. *See* Smith, *supra* note 43, at 56 n. 290.

[169] Note, *supra* note 62, at 664.

[170] *Id.* at 667. This may counteract some of the hesitancy which a therapist may experience in reporting child abuse. A child plaintiff wishing to bring a civil action for negligence against a non-reporting psychotherapist must prove the usual four elements of a negligence cause of action: a duty recognized by law; breach of the duty; a reasonably close causal connection between the breaching conduct and the resulting injury; and actual loss or damage. W. PROSSER, LAW OF TORTS 143 (4th ed. 1971).

[171] CAL. PENAL CODE § 11166 (West 1982).

of abuse involved, and whether the abuser still has contact with the child.[172] Thus, at least at first glance, it appears that the child abuse exception is in fact an exception for a *past* crime.[173] However, research indicates that child abuse is frequently linked to a certain style of child rearing and is generally repetitive in nature - so that the focus of the reporting may really be to prevent any future episodes even if the patient is "cured."[174] It is also possible that child abuse may not serve as an example for other past crimes, such as homicide,[175] because of the deference our judicial system has traditionally given to what it considers to be in the best interests of children. As Judge Cardozo, in his uniquely elegant style, wrote:

> The Chancellor . . . does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent,' and make provision for the child accordingly. . . .He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child,' or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. *Its concern is for the child.*[176]

---

[172] Note, *supra* note 62, at 668. The leading case on this issue appears to be another California case(!), People v. Stritzinger, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983), which reconciled the statutory duty of the psychotherapist to testify against his patient with the patient's expectation of privacy by stating that the patient must be made aware of the psychotherapist's legal duty to testify concerning the contents of his counseling services. It may be this type of therapist disclosure that Dean Smith felt would turn abusers away from therapy. Smith, *supra* note 93, at 56 n. 290.

[173] A past crime exception would allow the state to subpoena Dr. Oziel to testify against the Menendez brothers. As with cases of child abuse where the unavailability of the abused child to testify against the abuser makes the therapist's testimony possibly the only admissible evidence of guilt, so too, Dr. Oziel's testimony (or the tapes of his conversations with the brothers) may be the only evidence the dead parents have about their children's greed.

[174] Note, *supra* note 62, at 652. However, if it is indeed possible to have a "cured" child abuser who is allowed to remain with the child, the argument does remain that the child abuse exception may be an example of a privilege exception for a past crime.

[175] Dean Smith has argued that after the commission of a crime, presumably including homicide, the state's interest in obtaining what amounts to a confession to the therapist is weak because, at that point, the state can no longer prevent the crime's commission. Smith, *supra* note 93, at 55. Theoretically, though, the argument could be made that some criminal behavior is prone to repetition just like child abuse, and should be an exception to the privilege if the crime is outrageous enough to society's sensibilities - such as homicide.

[176] Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

Some states specifically provide that the past crime of homicide is an exception to the psychotherapist-patient privilege.[177] Within federal agencies, there is precedent in both the Freedom of Information Act[178] and the Privacy Act of 1974[179] to allow release of personnel and medical files for necessary law enforcement activities such as a criminal prosecution.[180]

Just as the attorney-client privilege does not apply where a client seeks legal help in the commission of a crime or fraud,[181] some psychotherapist-patient privilege statutes preclude a patient from claiming the privilege for activities that further a crime or fraud.[182] Although there does not appear to be a reported case using this argument, it might be possible to argue that an admission to a therapist of a crime, especially a personally troubling one such as a homicide, actually furthers the crime by making it easier for the patient to live with himself (i.e., not turn himself in). The therapist may provide the criminal/patient with an outlet for the emotional need to confess which previously might have driven the patient to confess to society and to the criminal justice system. No patient has a right to exploit a confidential relationship in order to, in effect, entrap the therapist as an unwitting participant in the criminal activity.[183]

Finally, at least on the federal level, there is an offense called "misprison of felony" which provides that a person is guilty of misprison when he has "knowledge of the actual commission of a felony . . . and . . . conceals and does not as soon as possible make known the same" to the

---

[177] *See, e.g.*, CAL. EVID. CODE § 1014 (West Supp. 1987) (providing that social workers, school psychologists and marriage, family and child counselors have no privilege in criminal cases, but psychiatrists and psychologists do, which covers Dr. Oziel); D.C. CODE ANN. § 14-307(b)(1) (1981) (exception to privilege for evidence in criminal cases where an accused is charged with causing death of, or inflicting injuries on, a human being, and disclosure is required in the interests of justice); ILL. ANN. STAT. ch. 91.5, para. 810(a)(9) (no privilege where disclosure relates directly to the circumstances surrounding a homicide); IND. CODE ANN. § 25-33-1-17 (l) (Burns Supp. 1986) (exception to privilege in homicide trials if the disclosure relates directly to facts or circumstances of homicide); VA. CODE ANN. §§ 8.01-399, 8.01-400.2 (1984) (physician-patient and psychologist-patient privileges apply only in civil cases). Recommendations have been made to modify Proposed Rule 504 to incorporate a waiver of the psychotherapist-patient privilege "in trials for homicide where the disclosure relates directly to the fact or immediate circumstances of said homicide." Knapp, VandeCreek & Zirkel, *supra* note 30, at 291.

[178] 5 U.S.C. § 552 (1976 & Supp. V. 1981).

[179] 5 U.S.C. § 552 (a) (1976).

[180] 5 U.S.C. § 552 a(b)(7), 552 a(b)(11). However, this probably would not be of much value to the prosecution in the Menendez case in a state court; it does illustrate that, at least in the area of government personnel files, privacy interests have given way to those of the accurate administration of justice.

[181] Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 473-74 (1977).

[182] CAL. EVID. CODE § 1018 (West 1990). This applies in the Menendez case.

[183] For instance, it is considered a conspiracy to defraud the government if a doctor condones a patient who comes to a Veterans Administration Hospital with certain psychiatric symptoms and, in the course of a session, confesses that he has been receiving compensation for self-inflicted wounds which he had claimed were received in combat. *See* Slovenko, *supra* note 105, at 394 n. 62.

authorities.[184] Convictions are rare because courts have held that the Government must prove an affirmative act of concealment to make its case.[185] However, this may be possible to prove where a patient has informed his therapist of a heinous crime; in such circumstances, the therapist may have to actively conceal reporting his patient to the authorities (or testifying against his patient). Otherwise, the therapist would have to submit to the duty he has to his own human dignity to violate his patient's confidence.[186]

VII. I See Our Session is Almost Over: Some Concluding Remarks

The state of the psychotherapist-patient privilege is confusing to say the least. Some federal circuits recognize it while others do not; state statutes generally recognize it for at least some categories of professionals but are riddled with legislative exceptions. Empirical studies have produced mixed results in attempting to verify the philosophical foundation for the privilege in terms of the negative effect disclosure might have on psychotherapy. However, it is clear that, in certain circumstances, the privilege excludes vital relevant evidence, perhaps the only evidence available. The child abuse reporting exception, which has been universally adopted by all fifty states, clearly indicates the willingness of legislatures to sacrifice confidentiality for the administration of justice where the crime is outrageous to society.

It is not unreasonable to assert that homicide, where the only evidence available relating to the actual crime might be a psychotherapist's testimony, is an example of a compelling area warranting the sacrifice of confidentiality. This is especially true since the cost to psychotherapy in general is dubious, while the loss of relevant evidence is extremely high. Especially in a well-publicized homicide, already involving great intrusion into the private, personal life of a defendant, the loss of the psychotherapist's evidence is an unrealistically high price to pay for an already lost sense of confidentiality.

This important but unnecessarily murky area would be greatly helped by the adoption of an explicit federal rule of evidence clearly outlining the psychotherapist-patient privilege, which professionals it applies to, and exceptions for specific past crimes, such as homicide and past/future crimes like child abuse. Clear federal action would provide a guideline to states grappling with the disparate interests of the criminal justice system and the psychotherapeutic community. Perhaps then it will not matter to a therapy patient in what state his crime is committed, or in which forum (state v. federal) his lawyer defends.

BRIAN DOMB

---

[184] *Id.* at 389 n. 43.

[185] Misprison of felony might not be an available cause of action in the Menendez case unless there is a parallel cause of action recognized in the state system.

[186] Tanay, Psychiatric News, April 16, 1975, at 2, col. 1.